FILE COPY

OCT 8 19

CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 452

GEORGE A. ADAMOS,
Petitioner
(Appellant Below),

vs.

NEW YORK LIFE INSURANCE COMPANY,
Respondent
(Appellee Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHARLES H. SACHS,
LOUIS CAPLAN,
Counsel for Petitioner.

1124 Frick Building,
Pittsburgh, Pa.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
JOSIAH SMITH CO., PENNSYLVANIA REPRESENTATIVE,
704 SECOND AVENUE, PITTSBURGH, PA.

SUBJECT INDEX.

Page

Petition:
- Statement 1
- The Questions Presented 3
- Reasons Relied on for the Allowance of the Writ 3

Brief:
- Opinions Below 5
- Jurisdiction 5
- Statement of the Case 5
- Specifications of Error 6
- Argument 6
- Conclusion 9

APPENDIX.

Constitutional Amendment and Statutes Involved 10

TABLE OF CASES CITED.

American Cyanamid Company v. Wilson & Toomer Fertilizer Company, 62 F. (2d) 1018, (cert. denied 289 U. S. 735) 4

Amendment VII to the Constitution of the United States 4, 8, 10

Ballantine's Law Dictionary, page 440 7

Buzzard v. Houston, 119 U. S. 347 6

Cable v. United States Life Insurance Co., 191 U. S. 288 6

Ford v. Huff, 296 Fed. 652 (C. C. A. 5th Cir. Cert. refused 266 U. S. 602) 8

Hipp v. Babin, 19 How. 271 7

Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, p. 242 8

Phoenix Mutual Life Ins. Co. v. Bailey, 80 U. S. 616 6

Petrogradsky Mejdunarodry Kom. Bank v. National City Bank, 253 N. Y. 23 8

Section 274 (b) Judicial Code (28 USCA Sec. 398) 2, 3, 4, 8, 9, 10

Section 267, Judicial Code (28 USCA Sec. 384) 7, 11

Section 384, Judicial Code 11

Schoenthal v. Irving Trust Co., 287 U. S. 92 7

Susquehanna S. S. Co. Inc. v. A. O. Anderson & Co., Inc., 239 N. Y. 285 8

Sutherland, Code Pl., Pr. & Forms, Sec. 87 8

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, Charles E. Hughes, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

George A. Adamos, the above named petitioner, respectfully prays that a writ of certiorari issue to review the decree (R.) of the United States Circuit Court of Appeals for the Third Circuit entered on July 10th, 1934, affirming the decree (R. 235) of the United States District Court for the Western District of Pennsylvania, dated November 4th, 1933, and made by Judge Schoonmaker, ordering that policies of insurance on which petitioner brought suit against the respondent be cancelled and rescinded.

Statement.

On December 22, 1932, petitioner filed a suit at law in the Court of Common Pleas of Allegheny County, Pennsylvania, to recover the sum of $20,000.00 on four life insurance policies, for the sum of $5,000.00 each, dated April 8, 1932, issued by respondent on the life of Andy Adamos, father of petitioner, in which policies petitioner was named beneficiary, the assured having died on July 6th, 1932 (R. 3).

On February 3, 1933, respondent caused this suit to be removed to the District Court of the United States for the Western District of Pennsylvania (R. 1).

On February 15, 1933, respondent filed an affidavit of defense (R. 9) in which it set up a defense that the insured obtained said policies by means of false and

fraudulent answers to questions contained in the application. In the affidavit of defense there was included a paragraph in which respondent prayed by way of equitable relief that the policy be surrendered, cancelled and rescinded.

On September 8, 1933, respondent filed a petition for a hearing in equity (R. 30), claiming that an equitable issue is raised by the pleadings which should be adjudicated by a chancellor according to equitable procedure, without a jury, and preferably in advance of a jury trial at law, pursuant to Sec. 274 (b) of the Judicial Code (28 USCA Sec. 398). On the same day a rule was granted on petitioner to show cause why the prayer of the petition should not be granted.

On September 18, 1933, petitioner filed an answer to said petition in which he averred that the alleged equitable defense is not an equitable defense sufficient to transfer the suit from the law to the equity side of the court but that it is a defense of fraud triable at law and he therefore prayed that the petition be dismissed.

On October 9, 1933, the court entered an order making absolute the said rule to show cause. On the same day the court granted an exeeption to petitioner to said order.

On November 4, 1933, after hearing the alleged equitable issue under Sec. 274(b) of the Judicial Code, as chancellor, the court made a decree ordering the said policies to be cancelled and rescinded and the respondent discharged of all liability on account of said policies and directing petitioner to surrender said policies to respondent.

On July 10, 1934, the Circuit Court of Appeals filed an opinion affirming the decree of the District Court entered on November 4, 1933.

The Questions Presented.

1. Is section 274(b) of the Judicial Code (28 USCA Sec. 398 printed in Appendix hereto) to be given effect merely as a procedural statute, or as one extending the jurisdiction of the federal equity court to cases over which it had no jurisdiction prior to said enactment?

2. If a person had no right, prior to the enactment of section 274(b) of the Judicial Code, to apply to a court of equity for relief by bill, has he, because of said enactment, the right to have his case tried, as in equity, before a chancellor by first setting up those facts as a defense in an action at law, and then moving to try that defense, as in equity?

3. If the statute is to be so construed, would it not be in violation of the Seventh Amendment to the Constitution of the United States?

4. Is a party to be denied his right to a trial by jury which he undoubtedly had before the enactment of section 274(b) of the Judicial Code, by reason of said enactment?

Reasons Relied on for the Allowance of the Writ.

A.

This court has ruled that where a party has a good defense at law to a purely legal demand, he should be left to that means of defense; that where a life insurance company has been sued on a policy which it claims was obtained by means of false representations, it has

a plain, adequate and complete remedy at law by pleading that defense in the law suit and has no occasion to resort to a court of equity for relief. The order complained of overturns that rule upon an erroneous construction of the Act of March 3, 1915, section 274(b) of the Judicial Code (28 USCA Sec. 398).

B.

The order complained of denies a trial by jury in a case which, prior to the passage of the Act of March 3rd, 1915, was triable only before a jury.

C.

The Act in question, as this court has held, is a procedural statute. It does not confer new jurisdiction upon courts of equity. If it did, it would violate the Seventh Amendment to the Constitution of the United States.

D.

The proper construction of section 274(b) of the Judicial Code is of the highest importance. Whether it has the effect of abolishing the right of trial by jury in cases where the right existed prior to the enactment should be settled by this court.

E.

The decision in this case by the Circuit Court of Appeals for the Third Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of American Cyanamid Company v. Wilson & Toomer Fertilizer Company, 62 F. (2d) 1018, (certiorari denied, 289 U. S. 735).

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Third Circuit, should be granted.

GEORGE A. ADAMOS

By

CHAS. H. SACHS

LOUIS CAPLAN

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the District Court is reported in 5 F. Supplement 1019 and is found at page 235 of the record. The opinion of the Circuit Court of Appeals is reported in 71 F. (2d) 997.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 10, 1934. Jurisdiction to issue the writ is found in the provisions of Section 240-a of the Judicial Code as amended by the Act of February 13, 1925, c. 229, section 1, 43 Stat. 938.

III.

Statement of the Case.

The principal facts are stated in the foregoing petition.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in not reversing the order of the District Court, dated November 4, 1933.

2. The Circuit Court of Appeals erred in affirming the decree of the District Court dated November 4, 1933.

3. The Circuit Court of Appeals erred in not holding that the petition for a hearing in equity should be denied.

V.

Argument.

Petitioner is the only person having an interest in the policy sued on. A judgment in favor of respondent on its defense in the law suit will terminate its liability on the policy. Respondent has not, in its affidavit of defense (R. 9) nor in its petition for hearing in equity (R. 33), made any claim to the contrary.

In Phoenix Mutual Life Ins. Co. vs. Bailey, 80 U. S. 616, this court has ruled that the defense that a policy was obtained by means of false representations is, if true, a good defense at law and that the defendant has no occasion to resort to a court of equity for relief, there being no special circumstances to show that it may suffer irreparable injury if it is denied a preventative remedy, or that the defense, at law, is not as perfect and complete as in equity.

See also Cable vs. United States Life Insurance Co., 191 U. S. 288, Buzzard v. Houston, 119 U. S. 347, and

Hipp v. Babin, 19 How. 271. In the last cited case the court said (p. 22):

> "And * * * whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

In the absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained: Sehoenthal vs. Irving Trust Co., 287 U. S. 92, and section 267 of the Judicial Code (28 USCA Sec. 384).

Respondent has not pleaded that it is without remedy at law, nor has it set up any facts to show that it is in need of equitable relief. Since respondent, under the facts of this case, had no right to file a bill in equity to cancel the policy before the statute was enacted, it cannot now have its defense treated as a controversy in equity, triable before a chancellor.

Respondent's defense is not an equitable defense within the meaning of the statute. Ballantine's Law Dictionary, at page 440, defines an "equitable defense" as follows:

> "Any matter which would authorize an application to a court of chancery for relief against a legal liability, *but which at law could not be pleaded in bar.* That is, a defense which is recognized by courts of equity, acting *solely* upon the inherent rules and principles of equity, altogether outside and independent of those rules and defenses which obtain in a court of law. The defense of laches is such an equitable defense." (Italics ours.)

Mr. Justice Cardoza defined "equitable defenses" in Petrogradsky Mejdunarodry Kom. Bank v. National City Bank, 253 N. Y. 23, and in Susquehanna S. S. Co. Inc. v. A. O. Anderson & Co. Inc., 239 N. Y. 285, similarly. In the latter case he said: "With us, the rule is that—

> 'Under the head of equitable defenses are included all matters which would have before authorized an application to a Court of Chancery for relief against a legal liability *but which at law could not have been pleaded in bar.*' " (Italics ours.)

The term "equitable defenses", within the meaning of section 274(b) of the Judicial Code, has been similarly defined in Ford v. Huff, 296 Fed. 652 (C. C. A. 5th Cir. Cert. refused 266 U. S. 602).

In considering this statute, the court, in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, at p. 242, made clear that in statutes of this character only the *formal* distinction between proceedings in law and equity is abolished. "Neither legal nor equitable remedies are abolished under such codes. 'What was an action at law before the code is still an action founded on legal principles; and what was a bill in equity before the code is still a civil action founded on principles of equity.' Sutherland, Code Pl., Pr. & Forms, Sec. 87." The court then adverted to the "most important limitation upon a Federal union of the two kinds of remedies in one form of action", namely, the Seventh Amendment to the Constitution of the United States preserving the "right of trial by jury".

Conclusion.

The use which has been made of Section 274 (B) of the judicial code to deny the right of trial by jury is a perversion of its purpose and it is extremely important that this Court shall so declare.

Respectfully submitted,

CHARLES H. SACHS
LOUIS CAPLAN
Counsel for Petitioner.

APPENDIX.

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED.

AMENDMENT VII TO THE CONSTITUTION OF THE UNITED STATES:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

— — — — —

SECTION 274b OF THE JUDICIAL CODE:

"Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require." (Mar. 3, 1915, c. 90, 38 Stat. 956.)

— — — — —

SECTION 384 OF THE JUDICIAL CODE:

"Suits in equity, when not sustainable. Suits in Equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." (R. S. §723; Mar. 3, 1911, c. 231, §267, 36 Stat. 1163.)